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No. 88-1532

In the Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner's interests are so marginally related to or inconsistent with the purposes of the Resource Conservation and Recovery Act of 1976 that petitioner lacks standing to pursue the challenges in this case.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-27a, 30a-40a) are reported at 861 F.2d 277 and 866 F.2d 433.

JURISDICTION

The judgment of the court of appeals in No. 86-1143 below was entered on October 7, 1988. Petitions for rehearing were denied on December 20, 1988. Pet. App. 28a. The judgment of the court of appeals in Nos. 87-1487, 87-1548, and 88-1177 below was entered on January 13, 1989. The petition for a writ of certiorari was filed on March 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves challenges by petitioner, an industry trade association, to three regulatory actions taken by the

Administrator of the United States Environmental Protection Agency (EPA), pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*

The first EPA action, which was the subject of the first opinion below, was the promulgation of final regulations establishing standards under Section 3004(q) of RCRA, 42 U.S.C. 6924(q), for used oil that is burned for energy recovery. The court of appeals dismissed part of petitioner's challenge to those regulations for lack of standing and upheld the rule in all other respects. Pet. App. 1a-27a.

The other two EPA actions are the subject of the second opinion below. EPA published a notice establishing the deadline for certain cement kilns burning hazardous waste fuel (HWF) to submit permit applications under Section 3005 of RCRA, 42 U.S.C. 6925 (1982 & Supp. IV 1986). EPA also promulgated final regulations establishing standards for the permitting of "miscellaneous units" under RCRA. The court of appeals dismissed petitioner's challenges to both of those EPA actions because petitioner lacked standing. Pet. App. 30a-40a. In both of its opinions, the court of appeals determined that petitioner's interests in the lawsuits were not within the "zone of interests" protected or regulated under RCRA.

1. In 1976, Congress enacted Subtitle C of RCRA, 42 U.S.C. 6921-6939b (1982 & Supp. IV 1986). Congress's aim was to create a comprehensive "cradle to grave" regulatory program to protect human health and the environment from the risks associated with the improper handling, storage, and disposal of hazardous waste. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976). To that end, EPA must identify and list those solid wastes that are hazardous, and thus subject to regulation under Subtitle C. See

42 U.S.C. 6921.[1] In addition, EPA must establish standards for the treatment, storage, and disposal of hazardous waste, 42 U.S.C. 6924 (1982 & Supp. IV 1986), and no facility that treats, stores, or disposes of hazardous waste may operate without a permit incorporating such standards. 42 U.S.C. 6925 (1982 & Supp. IV 1986). Finally, under Section 3014 of RCRA, 42 U.S.C. 6935 (Supp. IV 1986), EPA is authorized to regulate recycled oil, including used oil that is burned as fuel, even if the oil is not a hazardous waste.

On November 29, 1985, EPA published final regulations establishing treatment and management standards for boilers and industrial furnaces that burn hazardous waste and used oil for energy recovery. See 50 Fed. Reg. 49,164 (1985). That rule establishes two categories of regulation under which only hazardous waste fuel is subject to the stringent requirements for hazardous waste management under RCRA. Used oil burned for energy recovery is generally subject to less stringent regulation. Used oil that is deliberately mixed with hazardous waste, however, is subject to hazardous waste regulation, unless that hazardous waste comes from certain conditionally exempt small-quantity generators. Mixtures of used oil and hazardous waste from these small-quantity generators are subject only to regulation for nonhazardous used oil. *Id.* at 49,202 (renumbered and codified at 40 C.F.R. 261.5(j)). EPA also determined that residues from the combustion of certain fossil fuels and either hazardous waste fuels or

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[1] Section 3001, 42 U.S.C. 6921 (1982 & Supp. IV 1986), contemplates that particular solid wastes will be identified as "hazardous wastes" by virtue of their meeting one or more of the characteristics of hazardous wastes (characteristic wastes) or by virtue of their being specifically listed by EPA in rulemaking proceedings (listed wastes). See 40 C.F.R. Pt. 261.

used-oil fuels in certain industrial furnaces would be entirely exempt from hazardous waste management requirements. 50 Fed. Reg. 49,190 nn.87-89 (1985).

On September 15, 1987, EPA published a notice establishing the permit application deadline for certain cement kilns burning HWF.[2] See 52 Fed. Reg. 34,779 (1987). The notice allowed qualifying cement kilns to continue operation under RCRA "interim status," a statutory authorization that allows certain existing facilities to treat, store, or dispose of hazardous waste while their permit applications are pending. The notice applied only to the few qualifying cement kilns operating in cities with population of more than 500,000. See 42 U.S.C. 6924(q)(2)(C) (Supp. IV 1986).

On December 10, 1987, EPA published final regulations promulgating technical standards for "miscellaneous units." See 52 Fed. Reg. 46,946 (1987). Miscellaneous units are units that are used to treat, store, or dispose of hazardous waste, but that do not meet the description of any specific type of unit (*e.g.*, storage tanks and landfills) for which EPA had already promulgated technical standards. These regulations allowed the permitting of such units as salt domes, salt bed formations, underground mines, and caves for hazardous waste disposal.

2. Petitioner is a trade association that represents hazardous waste treatment facilities and firms that market hazardous waste treatment technology and services. On February 27, 1986, petitioner petitioned the court of appeals for review of the used-oil regulations (C.A. No. 86-1143). None of petitioner's members was subject to regulation under the provisions of the regulations that

[2] Cement kilns produce "cement clinker," which is combined with other materials to make powdered cement. Certain cement kilns are fueled by hazardous waste fuel, a secondary fuel source, as opposed to primary fuel sources such as coal.

petitioner challenged. The legal basis for the challenge was that the regulations were not sufficiently stringent or comprehensive to protect human health and the environment, and thus were inconsistent with EPA's mandate under RCRA. Petitioner claimed standing to maintain the action based on injury to the commercial or economic interests of its members; it alleged that more restrictive regulations would have expanded the market for products and services provided by petitioner's members.

The court of appeals concluded that the commercial interests represented by petitioner are not within the "zone of interests" protected by RCRA. Pet. App. 5a. Thus, petitioner lacks standing to represent member firms allegedly suffering economic injury resulting from the failure of EPA's regulations to force others to use the more costly methods or technology that petitioner's members employ or offer for sale. The court of appeals held, however, that petitioner does have standing to represent members allegedly suffering an environmental injury as a result of the alleged laxity of EPA regulations. Since one of petitioner's members did allege an environmental injury, the court of appeals reached the merits of petitioner's petition for review. The court upheld the used-oil regulations challenged by petitioner as consistent with RCRA. *Id.* at 21a-27a.[3]

3. Petitioner also petitioned for review of the notice establishing the permit deadline for cement kilns (C.A. No. 87-1548) and the regulations for miscellaneous units

[3] The court of appeals' holding that petitioner lacks standing applies only to petitioner's challenge to EPA's exemption from the used-oil regulations for residues from certain industrial furnaces. Petitioner does not seek a writ of certiorari on any of the court of appeals' rulings on the merits.

(C.A. No. 88-1177).[4] At the time the petitions for review were filed, petitioner alleged solely economic and competitive injury to its members as a result of EPA's actions. The economic injury was a loss of potential treatment business and HWF supply as a result of the diversion of hazardous waste to less costly methods of hazardous waste management. Such diversion was allegedly encouraged by the EPA actions, which allowed certain cement kilns to burn HWF before receiving a permit, and the potential permitting of geologic repositories for disposal of hazardous wastes.

The court of appeals held the petitions for review pending the disposition of a petition for rehearing with suggestion of rehearing en banc concerning the holding in its earlier opinion that petitioner's allegations of economic injury do not suffice for standing purposes. See Pet. App. 35a. On December 20, 1988, the court of appeals unanimously denied rehearing and rehearing en banc. *Id.* at 28a-29a. The court of appeals then disposed of the pending consolidated petitions for review based on its earlier opinion. The court of appeals held that the alleged competitive economic injuries are insufficent to bring petitioner within the zone of interests protected by RCRA. *Id.* at 32a.

The court of appeals also rejected petitioner's claim of standing on the basis of the interests of two new "members" of petitioner—individual private citizens allegedly suffering environmental injury—because those individuals were added as members after the statutory 90-day period (see 42 U.S.C. 6976(a)(1)) for challenging

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[4] The court of appeals consolidated those two petitions, and a similar petition filed by Petro-Chem Processing, Inc. (C.A. No. 87-1487), which is not a party here (Pet. ii n.**), for disposition in a single opinion.

these actions under RCRA. Pet. App. 36a-39a. Finally, the court of appeals also held that the possibility that some of petitioner's members might dispose of their treatment residues in geologic repositories that fail to contain the residues in the future, that those members might ultimately be financially responsible for the resulting contamination, does not provide standing. *Id.* at 39a-40a. Because petitioner's members are not required to use any unsafe disposal methods, and the use of the geologic repositories would be entirely voluntary, the court found the alleged economic injury to be self-inflicted, and thus not fairly traceable to the challenged EPA regulations.

ARGUMENT

The standing "zone of interests" test concerns "the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Association of Data Processing Service Orgs., Inc.* v. *Camp,* 397 U.S. 150, 153 (1970). The test excludes plaintiffs whose lawsuits "are more likely to frustrate than to further the statutory objectives." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987).

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id. at 399. The court of appeals properly applied this prudential "zone of interests" test to petitioner's interests in the cases below. Petitioner's fact-bound challenges to the straight forward analysis of the court of appeals do not merit this Court's review.

1. Petitioner first argues (Pet. 10-22) that the ruling below is contrary to this Court's decision in *Clarke* v. *Securities Indus. Ass'n, supra.* Petitioner contends that the court of appeals required an affirmative demonstration of congressional intent to benefit the petitioner in order to demonstrate standing, a proposition rejected by this Court in *Clarke.* That is incorrect. Instead, the court of appeals sought to find "operational meaning for a test that demands less than a showing of congressional intent to benefit but more than a 'marginal[] rela[tionship]' tc the statutory purposes." Pet. App. 10a.

Under this Court's decision in *Clarke*, whether a plaintiff is within the "zone of interests" of a statute is a question of whether it should be reasonably inferred that Congress intended that a person with the interest of the particular plaintiff be relied on to challenge an agency's alleged disregard for the law. *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403.[5] Under the principles set forth in *Clarke*, the prudential test for standing does not require an indication of a congressional purpose to benefit the plaintiff. *Id.* at 399-400. Rather, the zone of interests test is satisfied when " 'Congress ha[s] *arguably legislated against the [injury]* that [petitioner seeks] to challenge.' " *Id.* at 403 (quoting *Investment Co. Inst.* v. *Camp.*, 401 U.S. 617, 620 (1971) (emphasis added)). See *Arnold*

[5] Petitioner confuses two related, but separate issues: reviewability, or whether a particular agency action is subject to judicial review by *any party* (see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)), and the standing zone of interests test, or whether a *particular party* should be heard to challenge a particular agency action. Pet. 10-11, 23-24. See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 399. The general presumption in favor of judicial review of agency action under the Administrative Procedure Act does not concern the issue of who are proper parties to challenge agency action.

Tours, Inc. v. *Camp*, 400 U.S. 45, 46 (1970); *Data Processing Service Orgs.*, 397 U.S. at 155-156.

Petitioner's members are not regulated by the provisions of the regulations that they challenged in the petitions for review. Nor does petitioner represent, or otherwise claim here an injury to its members with respect to, the human health or environmental interests that RCRA was indisputably designed to protect.[6] Rather, petitioner's sole interest in these challenges is the enhanced market position and profit to its members that may result from the application of more stringent or comprehensive environmental regulations to other members of the regulated community. Because the pecuniary interests of its members thus may coincide with more stringent hazardous waste regulation, petitioner asserted below that its interests are within the zone of interests protected under RCRA.

In assessing the standing of petitioner, the court of appeals determined that the treatment industry was not an intended beneficiary of the congressional purpose to protect human health and the environment under RCRA. Pet. App. 11a, 35a-36a. Rather, the financial benefit to petitioner's members resulting from the statute and EPA regulations was an incidental result of the congressional objective in RCRA to promote safer management of hazardous waste by encouraging treatment and recycling over land disposal. As the court of appeals observed, the indisputable congressional intent to promote human health and the environment by encouraging the proper treatment and disposal of hazardous wastes

> shows neither that Congress intended to benefit recycling and disposal firms nor that such firms' in-

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[6] See 42 U.S.C. 6902(a)(4) and (6) (Supp. IV 1986). See also H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976); H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 80-81 (1984).

> terests are more than "marginally related" to Congress's environmental purposes. Whenever Congress pursues some goal, it is inevitable that firms capable of advancing that goal may benefit. If Congress authorized bank regulators to mandate physical security measures for banks, for example, a shoal of security services firms might enjoy a profit potential. * * * [A] rule that gave any such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue.

Pet. App. 11a.

In applying the *Clarke* analysis to petitioner, the court of appeals found that petitioner's interests were no more than marginally related to the purposes of RCRA. Pet. App. 10a-11a. That is because petitioner was before the court of appeals not as a protector of the environment, but as a representative of a group of entrepreneurs promoting business expansion and seeking protection from alleged economic injury caused by increased competition. *Id.* at 9a. Thus, the court of appeals properly determined that petitioner's competitive interests were only incidentally related to RCRA's environmental goals.[7]

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[7] Contrary to petitioner's argument that the court of appeals created a new test or barrier for standing by requiring an affirmative demonstration of congressional intent to permit suit, the court of appeals expressly stated that the prudential zone of interest test "demands less than a showing of congressional intent to benefit but more than a 'marginal[] rela[tionship]' to the statutory purposes." Pet. App. 10a. The court of appeals' formulation of the test takes into account circumstances—which the court of appeals found to be present in the cases below—where a petitioner's interests "are more likely to frustrate than to further statutory objectives." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 397 n.12. Accordingly, the court of appeals ac-

Contrary to petitioner's assertion, the court did not require the explicit indication of congressional intent to benefit that this Court rejected in *Clarke*. Rather, the court sought to determine whether petitioner, which is only an incidental beneficiary of congressional action and asserts interests that may be inconsistent with statutory goals, asserts any interest that is more than marginally related to the statutory purposes. In so doing, the court of appeals looked for factors other than explicit indications of congressional intent that would support a reasonable inference that Congress arguably intended to permit the suit. That inquiry, which is entirely consistent with *Clarke* and, indeed, which must be undertaken if the "zone of interests" test is to mean anything, is (in context) all that the court of appeals meant by saying that a court should determine whether a would-be litigant such as petitioner is "a peculiarly suitable challenger of administrative neglect," Pet. App. 11a.

Nor did the court ignore the statutory context, as petitioner asserts (Pet. 13-17). Rather, the court of appeals determined that the statutory goals of RCRA, Pet. App. 11a, and the relevant legislative history, *id.* at 35a-36a, confirm congressional intent to encourage proper disposal and recycling of hazardous waste. The court of appeals concluded, however, that such an intent does not demonstrate that the competitive and financial interests of hazardous waste treatment *firms* have more than a marginal relationship to Congress's environmental goals under RCRA. *Ibid.*

Moreover, the court of appeals perceived a significant risk that petitioner's challenges under RCRA could pro-

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counted for both elements of the zone of interest test articulated in *Clarke*: the "marginally related" element *and* the "inconsistent with the purposes implicit in the statute" element. *Id.* at 399.

duce results inconsistent with the environmental goals of the statute. Pet. App. 11a-12a. The court of appeals determined that the outcome of judicial review initiated to promote petitioner's competitive interests, while it might benefit the profits of petitioner's members, could lead to environmentally harmful results. *Id.* at 12a. That is because the increased cost of more stringent regulations might lead to the substitution of more environmentally harmful waste management methods. *Ibid.*

The same risk was also present in Nos. 87-1487 and 87-1548 below, wherein petitioner sought to limit the number of facilities burning HWF in competition with petitioner's members. If successful, petitioner's challenge would have fostered the use of rural cement kilns, which are totally unregulated under RCRA, and the associated transportation of hazardous waste over long distances to those kilns. Another result of petitioner's challenge might be that fewer facilities would be qualified to treat hazardous waste, contrary to congressional intent to promote environmentally protective process substitution, materials recovery, properly conducted recycling and reuse, and treatment. See 42 U.S.C. 6902(a)(4) and (6) (Supp. IV 1986). The court of appeals' ruling was thus a direct application of *Clarke* to the standing of petitioner under RCRA.

Petitioner concedes here (Pet. 17) that the protection of its economic and competitive interests was "obviously not the ultimate purpose" that Congress intended to further in enacting RCRA.[8] Rather, Congress was legislating to protect human health and the environment. Congress was not

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[8] To support its argument that EPA has "openly acknowledged" consistency between petitioner's interests and the goals of RCRA, petitioner cites a *Federal Register* notice in an unrelated administrative proceeding in which EPA restated allegations of fact that petitioner has made. Pet. 17 n.20; see 52 Fed. Reg. 43,906 (1987). The statement in the *Federal Register* notice, however, was merely a recitation of an

regulating economic competition in RCRA.[9] Consequently, Congress has not " 'arguably legislated against the [injury] that [petitioner seeks] to challenge.' " *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403 (quoting *Investment Co. Inst.* v. *Camp*, 401 U.S. at 620). The court of appeals reasonably concluded that a number of factors preclude any reasonable inference that Congress intended to rely on commercial interests such as petitioner's to vindicate environmental claims under RCRA.

2. Petitioner contends (Pet. 13, 28) that the decision below conflicts with *DeLoss* v. *Department of Housing & Urban Development*, 822 F.2d 1460 (8th Cir. 1987); *Foremost Sales Promotions, Inc.* v. *Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229 (7th Cir. 1988); and *City of Milwaukee* v. *Block*, 823 F.2d 1158 (7th Cir. 1987). No such conflict exists.

The present case turns on whether Congress has " 'arguably legislated against the [injury] that [petitioner seeks] to challenge,' " *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403, an inquiry that naturally will vary in its application from statute to statute. The court of appeals, faithfully carrying out the inquiry mandated by *Clarke*, studied the provisions and purposes of RCRA and deter-

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as-yet-unsubstantiated allegation by petitioner in administrative proceedings that have not yet been completed. See 53 Fed. Reg. 32,899 (1988).

[9] In the cases where this Court has found competitor standing, the statutes at issue contained provisions protecting parties from unlawful competition. See, *e.g.*, *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-7 (1968); *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77, 83-84 (1958). RCRA contains no such provisions that make competition unlawful. Thus, the court of appeals properly concluded that the cases involving commercial competition and market entry restrictions do not apply to the zone of interests inquiry under RCRA. Pet. App. 12a-14a.

mined that it would be inconsistent with the purpose of the relevant statute to allow the suit. See also *Sacilor, Acieries et Laminoirs de Lorraine* v. *United States*, 815 F.2d 1488, 1491 (Fed. Cir.), cert. denied, 108 S. Ct. 285 (1987). The cases that petitioner cites involve the construction of statutes whose provisions and purposes do not remotely resemble those of RCRA—in *DeLoss*, statutes providing support for low-income housing; in *Foremost*, a statute regulating the economic relationship between distributors and retailers of alcoholic beverages; and in *Milwaukee*, statutes regulating the preferences among various shippers of agricultural commodities. To hold that "competitors" of those who are primarily regulated by *those* statutes have standing is hardly to say that any decision denying "competitors" standing under *any* statute is wrong. The decision below in no sense conflicts with the decisions that petitioner cites.

3. Petitioner also asserts (Pet. 22-30) that the court's ruling represents a significant restriction on judicial review of agency action allegedly inconsistent with statutory directives, particularly EPA actions under environmental statutes. The ruling below is very narrow, however. The question addressed by the court was not whether commercial injury is a basis for standing in challenges to environmental regulations, whether the treatment industry has standing to participate in administrative actions, or whether petitioner may be a party to a challenge alleging unlawful laxity in EPA regulations. Rather, the court below merely held that petitioner's commercial or competitive economic interests fail to meet prudential standing requirements as a protected interest under a statute indisputably designed to promote human health and environmental interests. Thus, under the ruling of the court of appeals, a firm or its trade association representative

may not initiate a challenge to environmental regulations under RCRA that do not apply to the firm where the sole alleged injury is that the rules do not sufficiently maintain or enhance market position or profits.

Commercial firms alleging economic injury would generally have standing to challenge rules under which they are regulated and that injure their interests, commercial or otherwise.[10] The vast majority of challenges by industry members to EPA regulations are of this type. Moreover, the firm may be a party to a challenge to alleged laxity in environmental regulation if another plaintiff or petitioner meets the applicable prudential standing requirements. Indeed, the court of appeals recognized this in the companion case to petitioner's challenge to the used-oil regulations, where petitioner was a co-petitioner with an environmental organization. *Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 270, 273 (D.C. Cir. 1988) (challenge to EPA decision not to list certain used oil as hazardous waste). Finally, the firm may, of course, continue to pursue its interests by administrative means (*e.g.*, by petitioning EPA for a rulemaking) and by legislative means. Accordingly, this case – involving only a particular application of settled legal principles – fails to raise an important question that merits review by this Court.

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[10] See Pet. App. 8a ("That the injury is commercial is no obstacle. '[S]neering at [commercial] gains by adding "mere" to them does not make them go away.' ").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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